SASINTHIRAN BALAKRISHNAN A

v.

KETUA POLIS NEGARA & ANOR AND ANOTHER CASE

B

HIGH COURT, KUALA LUMPUR
SOFIAN ABD RAZAK J
[CRIMINAL APPLICATIONS NOS: 44-177-2010
& 44-180-2010]
28 OCTOBER 2010 C

CRIMINAL PROCEDURE: *Contempt of court - Writ of habeas corpus, failure to obey - Re-arrest of applicants - Whether terms of court order breached - Whether alleged contemnors had notice of court order - Knowledge of - Whether alleged contemnors disobeyed terms of writ of habeas corpus - Whether onus on applicants to prove - Whether contempt proved beyond reasonable doubt* D

CRIMINAL PROCEDURE: *Habeas Corpus - Release of detainee (applicants) - Re-arrest of applicants - Contempt of court - Whether terms of court order breached - Whether alleged contemnors had notice of court order - Knowledge of - Whether alleged contemnors disobeyed terms of writ of habeas corpus - Whether onus on applicants to prove - Whether contempt proved beyond reasonable doubt* E

CIVIL PROCEDURE: *Contempt of court - Burden of proof - Writ of habeas corpus, failure to obey - Re-arrest of applicants - Whether terms of court order breached - Whether onus on applicants to prove - Quasi-criminal - Whether contempt proved beyond reasonable doubt - Whether evidence produced sufficient to establish charge - Knight & Anor v. Clifton & Ors* F G

EVIDENCE: *Burden of proof - Beyond reasonable doubt - Contempt of court - Writ of habeas corpus, failure to obey - Re-arrest of applicants - Whether terms of court order breached - Whether onus on applicants to prove - Quasi-criminal - Whether contempt proved beyond reasonable doubt - Whether evidence produced sufficient to establish charge - Knight & Anor v. Clifton & Ors* H

Separate *ex parte* notice of motion (encls. 5) in both suits were filed by the applicants respectively for leave to initiate contempt proceedings against the respondents. The facts of this case were in relation to the re-arrest of the applicants after the High Court had granted a writ of *habeas corpus* ordering the detaining I

A authority, *ie*, Pusat Pemulihan Akhlak Simpang Renggam ('detention centre'), to release the applicants forthwith. However, the applicants alleged that as soon as they stepped out of the detention centre, they were re-arrested by the police pursuant to s. 3(1) of the Emergency (Public Order and Prevention of Crime)
B Ordinance 1969. The applicants submitted that the act of re-arresting them based on the same grounds as before tantamounts to a conduct amounting to contempt which was intended or likely to interfere with or obstruct the fair administration of justice. On 29 September 2010, this court found that there was a *prima facie*
C case against the respondents to answer the charge as framed for contempt of court and granted leave *inter partes* to commence committal proceedings. Pursuant to the said order of granting leave, the respondents were alleged to have breached the terms of the court order.

D

Held (dismissing the applicants' applications under encls. 5):

(1) The court will only find a person guilty and punish for contempt of court for breach of the court order if it is
E satisfied that the alleged contemnors had proper notice of the court order and is proved beyond reasonable doubt. A contempt of court is an offence of a quasi-criminal character wherein the burden of proof on the applicants in these committal proceedings is similar to the prosecution in a
F criminal trial. Hence, it must be proved beyond reasonable doubt (*Knight & Anor v. Clifton & Ors*; refd). (para. 9)

(1a) The applicants must have proved beyond reasonable doubt that the respondents had notice of the terms of the court order and acted in breach of the said order. They must have
G demonstrated that the respondents did in fact, with knowledge of the terms of the writ of *habeas corpus* had disobeyed it. Unless the court was satisfied that the charge had been established beyond reasonable doubt, it would not exercise its powers for contempt on mere conjecture.
H Besides, it is not the function of the court to venture beyond what was before it and to look for the answers in order to satisfy itself. (paras. 10 & 11)

(2) The court was not satisfied that the respondents had notice
I of the express terms of the writ of *habeas corpus*. Further, the onus was on the applicants to show that both the respondents were served with the writ of *habeas corpus*, that

they knew of the terms thereof and yet breached it. The evidence produced by the applicants was insufficient to establish the charge beyond reasonable doubt. As such, the respondents could not be committed for contempt of court. (para. 15)

Case(s) referred to:
Abdul Ghani Haroon v. Ketua Polis Negara & Another Application (No 4) [2001] 3 CLJ 606 HC ***(dist)***
Knight & Anor v. Clifton & Ors [1971] Ch 700 ***(refd)***

Legislation referred to:
Emergency (Public Order and Prevention of Crime) Ordinance 1969, ss. 3(1), (3), 4(1)
Rules of the High Court 1980, O. 52 r. 2(2)

Other source(s) referred to:
Halsbury's Laws of England, Vol 7, Hailsham edn, p 6, para 8

For the applicant - Datuk N Sivananthan; M/s Sivananthan
For the respondents - Mohd Najib Zakaria SFC

Reported by Kumitha Abdul Majid

JUDGMENT

Sofian Abd Razak J:

[1] Separate *ex parte* notice of motion (encls. 5) (hereinafter called 'the application') in both matters for leave to initiate contempt proceedings against both the respondents were filed on 1 June 2010 and 23 September 2010 respectively. For the purpose of this applications, the party shall be called the 'applicant' and the alleged contemnors will be referred to as the 'respondent'. The notice of motion is supported by affidavits in support namely encl. 3 and 4 respectively affirmed by the applicant. A statement of facts was also filed as required by O. 52 r. 2(2) of the Rules of the High Court 1980. At the request of the learned counsel for the applicants, both applications were heard together and the hearing date was fixed on 17 August 2010. It was informed to the court that copies of both the *ex parte* applications were served on the respondents and it became an *inter parte* hearing. In consequence thereof, En Najib Zakaria SFC appeared on behalf of the respondents on 19 August 2010

A and argued that the said applications were frivolous and without any legal basis and should be dismissed forthwith. The learned SFC had also filed affidavits in reply to the affidavit in support of the application by the applicant. The learned counsel for the applicants in response submitted that it was premature for the
B learned SFC to raise objection at the leave application stage. In any event the merits of the application is irrelevant at this stage. What is pertinent here was whether on the facts deposed thereto in the affidavit in support of the *ex parte* application and the statement of facts pursuant to O. 52 of the Rules of the High
C Court 1980 that the said application was frivolous and without any legal basis. As a matter of procedure, the learned counsel said the applications need not have to be served on the respondents since it was by way of an *ex parte* and could easily have got the order for leave. Nevertheless, the court then directed that the
D leave application be heard as an *inter parte* hearing fixed on 23 September 2010 with arguments limited to the issue of whether the applications filed were frivolous and without any legal basis.

The Factual Matrix Of The Applications

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[2] This can be seen from the affidavits in support of this application as well as the statement of facts filed pursuant to O. 52(2) of the Rules of the High Court which are as follows:

Both applicants have successfully obtained from the High Court
F Kuala Lumpur a writ of *habeas corpus* ordering the detaining authority namely the Pusat Pemulihan Akhlak Simpang Renggam, Johor to release the applicants forthwith. In the instant case the High Court Kuala Lumpur had granted a writ of *habeas corpus* on 29 July 2010. The sealed copy of the order dated 29 July was
G served on the Pusat Pemulihan Akhlak Simpang Renggam, Johor (hereinafter called 'the detention centre') and the applicant was released from the detention centre. However, the applicant alleged that as soon as he stepped out of the detention centre he was immediately re-arrested by the police pursuant to s. 3(1) of the
H Emergency (Public Order and Prevention of Crime) Ordinance 1969, (hereinafter called the 'Ordinance'). A similar situation also arose in the application No: 44-180-2010 where the applicant was also re-arrested as soon as he was outside the gate of the detention centre, by the police.

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Submission By Learned Counsel For The Applicant

[3] The act of re-arresting by the police based on the same grounds as before, according to the learned counsel for the applicant, tantamounts to conduct amounting to contempt which was intended or likely to interfere with or obstruct the fair administration of justice and quoted the case of *Abdul Ghani Haroon v. Ketua Polis Negara And Another Application (No 4)* [2001] 3 CLJ 606.

Submission By Learned SFC For The Respondents

[4] Denies that the conduct of re-arresting the applicant outside the gate of the detention centre after he was released tantamounts to conduct amounting to contempt which was likely to interfere with or obstruct the fair administration of justice.

Finding Of The Court

[5] On 29 September 2010, this court having found that there was a *prima facie* case made out against the respondents to answer the charge as framed for contempt of court had granted leave *inter parte* to commence the committal proceedings. Pursuant to the said order of granting leave, the respondents were alleged to have breached the terms of the court order dated 29 July 2010 and 10 July 2010 respectively of whom both respondents now stand to be committed to prison for contempt.

On Contempt Of Court

[6] What constitutes contempt of court is succinctly stated in *Halsbury's Laws of England* (Vol 7) (Hailsham Ed) at p. 6 para. 8 which states as follows:

> ... any act done or writing published which is calculated to bring a judge into contempt or to lower his authority or to interfere with due course of justice or the lawful process is contempt.

'Oswald on Contempt' also defines contempt to be constituted by:

> ... any conduct that tends to bring the authority and administration of law into disrespect or disregard or interfere with or prejudice parties, litigants or witness during litigation.

[7] It may be seen from these passages that contempt is of two kinds namely:

A (a) that which interferes with the due course of justice and pollutes the stream of justice, in so far as it concerns parties to a cause, as for instance, when comments are made on a pending case, and

B (b) that which is calculated to bring a judge into contempt or lower his authority or to interfere with the lawful process of the court.

[8] There can be no doubt therefore that any act which is calculated to undermine the authority of the court and to disturb C the confidence of the citizen in the unquestioned effectiveness of its orders as against any executive authority however high would be contempt. Of course, this is not to say that every act will necessarily be treated as contempt by courts in whom this drastic and summary jurisdiction is vested, not for the personal D glorification of a judge in his office, but for the effective maintenance of the strong arm of the judicial administration. No one is more conscious than a judge how sparingly such drastic and summary power is to be used.

E **[9]** Reverting to the instant case, the court will only find a person guilty and punished for contempt of court for breach of the court order, if it satisfies itself that the alleged contemnors had proper notice of the court order and it is proved beyond reasonable doubt (see *Knight & Anor v. Clifton & Ors* [1971] Ch F 700. The burden of proof on the applicant in these committal proceedings is similar to the prosecution in a criminal trial. A contempt of court is an offence of a quasi-criminal character. A man may be sent to a prison for it. It must be satisfactorily proved beyond reasonable doubt.

G **[10]** The applicants in the case before the court must prove beyond reasonable doubt that the alleged contemnors had notice of the terms of the court order and acted in breach of the said order. The applicants must necessarily demonstrate that the H alleged contemnors did in fact, with knowledge of terms of the writ of *habeas corpus* had disobeyed it.

[11] In the circumstances, it is important at this stage to stress that unless the court is satisfied that the charge has been I established beyond reasonable doubt, it will not exercise its powers for contempt on mere conjecture. It is not the function of the court to venture beyond what was before it and to look for the answers in order to satisfy itself.

[12] In both applications it was stated that the writ of *habeas corpus* were served on the Pusat Pemulihan Akhlak Simpang Renggam Johor respectively and not on both the alleged contemnors personally. The query was whether there was proof to show that both the alleged contemnors knew of the terms of the writ of *habeas corpus*. The court is unable to find any iota of evidence to support this contention. The onus is on the applicants to show that both the alleged contemnors were served with the writ of *habeas corpus* and that they knew of the terms thereof and yet breached it. Failure on the part of the respondents to file any affidavit does not relieve the applicants of the duty of proving its case beyond reasonable doubt.

[13] As indicated earlier, the learned counsel for the applicant has placed much reliance on the case of *Abdul Ghani Haroon v. Ketua Polis Negara (supra)*, where the learned trial judge not only allowed the applicant's for a writ of *habeas corpus* but also made a further consequential order that the police be restrained from rearresting the applicants at least for a period of 24 hours. I am of the view that the facts in *Abdul Ghani Haroon (supra)* and the facts of instant case can be easily distinguishable. In the instant case, the learned trial judge did not make a further consequential order similar to that in *Abdul Ghani Haroon* and I do not intend to adopt the decision in *Abdul Ghani Haroon* in my decision.

[14] In any event if one were to look at the affidavit in support by the applicants it transpires that the re-arrest took place outside the detention centre. That is to say as far as the terms of the writ of *habeas corpus* is concerned, the applicants were released from the detention centre as soon as the writ of *habeas corpus* were served on Pusat Pemulihan Akhlak Simpang Renggam, Johor.

[15] On the totality of the evidence, the court is not satisfied that the alleged contemnors had notice of the express terms of the said writ of *habeas corpus*. The evidence produced by the applicants against both the alleged contemnors is insufficient to establish the charge beyond reasonable doubt. The alleged contemnors are not obliged or required by law to disprove the *prima facie* case as found by the court when it granted leave on 29 September 2010. The alleged contemnors cannot be committed for contempt of court and it is not safe to make such a finding.

[16] As to the allegations that the police cannot rearrest the applicants based on the same reasons as during the first detention, in view of the fact that during the material time that the applicants were in detention and up to the time they were released, the applicants could not have been involved in the same criminal activities as before. On this issue the first respondent at para. 5 of encl. 10 of application no: 44-177-10 had stated that 'berdasarkan hasil penyiasatan yang dijalankan terhadap kepada akitiviti-aktiviti jenayah pemohon dan tindakan pemantauan dan pencegahan efektif yang terdapat dalam undang-undang pencegahan khususnya dibawah Ordinan tersebut perlu digunapakai dalam usaha untuk membenteras kegiatan aktiviti-aktiviti pemohon' the court is of the view that under the Ordinance, Parliament have expressly provided the police with wide powers under s. 3(1) to detain the applicants whom they viewed as having been involved in the criminal activities and thereafter would submit a report under s. 3(3) of the Ordinance to the Honourable Minister who having read the report presented to him may issue a detention order under s. 4(1) of the Ordinance. Section 3(1) of the Ordinance is silent as to whether the police could not use the same reasons for the re-arrest of the applicants.

[17] In the circumstances and accordingly, the court finds that both the alleged contemnors not guilty of contempt of court and consequently, dismissed both the notice of motion in encl. 5.